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Product Liability in a Litigious Society

Lawsuits related to alleged defective products or to alleged medical malpractice have been increasing rapidly in numbers and in awards. Already the competitiveness of the United States has been lessened and the practice of medicine negatively affected. The game appears to be stacked in favor of plaintiffs and especially their lawyers. Awards in the multimillion dollar area are frequent.

In what follows I will draw on a recently released report of the Conference Board.* Caution in acceptance of the views expressed in the document may be warranted. However, much of the information presented is already in the public domain. For example, the rapidly soaring costs of liability insurance for both products and malpractice are well known.

Two instances of increases in costs of product liability insurance dramatize the impact of successful litigation or threats thereof. In 1984, a pharmaceutical firm paid \$72,000 for \$100 million in liability coverage (after deductions). In 1985 the company paid \$85,496 for \$18 million in coverage. By 1986 insurers were asking \$1.8 million for \$15 million in coverage. Piper Aircraft estimates that insurance costs add \$75,000 to the cost of every new plane they build. These costs are greater than their total costs for manufacturing some small aircraft. The chief executive officer of another small aircraft manufacturer states that "the current product liability system has essentially destroyed the piston aircraft industry. From a peak of 18,000 aircraft per year in 1978–79, the total current piston aircraft production has fallen to less than 1,000 units per year."

The costs of defending a product liability suit can be very large both in terms of money and in demands on top executives' time and thought. Frequently, thousands of documents must be produced and eight to ten witnesses deposed. The production of tens of thousands of documents and dozens of witnesses is not rare. Costs to the defendant may amount to millions of dollars. The circumstances make feasible a form of legalized extortion. The plaintiff's lawyers can file suits for amounts that are substantial but less than the costs of defending suits. In one instance, the defendants estimated a 98 percent chance of winning a suit, but at a cost of \$3 to \$5 million. The plaintiffs were willing to settle for \$200,000. The company paid the \$200,000, though regarding the matter as pure and simple blackmail.

In contrast to the United States, some foreign countries have severe limits on liability exposure. They accept the theory that when a person uses a power tool there is inherent danger. Thus in some countries costs of liability insurance are only a few percent of those in the United States. Moreover, there is less tendency to sue. The report cites the experience of Dow Chemical, which has foreign sales of about \$7 billion and domestic sales of \$6 billion. In 1986, the company's legal and insurance expenses in the United States exceeded \$100 million. Its comparable foreign expense was less than \$20 million. During 1987 Dow was a defendant in the United States in 456 suits, but in only 4 suits outside the United States.

Company executives are especially concerned about punitive damages and liability for products manufactured and sold many decades ago. Some of the huge punitive awards that are made seem to be motivated by a desire to injure the rich or powerful rather than to render justice. Particularly when cases are tried before juries anything in the way of a punitive award can happen. Juries do not realize that in the end the costs are usually borne by the public.

The product liability system imposes a heavy burden on firms that make long-lasting, high-quality products. The longer the usage, the more people using, the greater the liability exposure. An extreme case is the elevator industry. It is not unusual for manufacturers to be sued for equipment that has been in service for more than 70 years. Many suits are related to alleged minor injuries that arise from tripping on unlevelled elevators.

Prospects for immediate reform are not very good. Most observers believe that Congress will not pass a reform bill in this session. Action at the state level is moving more quickly, but it leaves much to be desired. Excessive product liability costs will continue to be a drain on society.—PHILIP H. ABELSON

*E. Patrick McGuire, "The Impact of Product Liability" (Report 908, The Conference Board, New York, 1988).